

2006

# Ten Vital Virtues for American Public Lawyers

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## Recommended Citation

Robert F. Blomquist, Ten Vital Virtues for American Public Lawyers. 39 Ind. L. Rev. 493 (2006).

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# TEN VITAL VIRTUES FOR AMERICAN PUBLIC LAWYERS

ROBERT F. BLUMQUIST\*

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In the tradition of the "great books" of the last five millennia of human civilization,<sup>1</sup> virtue and vice have been persistent and vital themes.<sup>2</sup>

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\* Professor of Law, Valparaiso University School of Law. B.S., 1973, University of Pennsylvania (Wharton School); J.D., 1977, Cornell University. My thanks go to my law students over the last twenty years who have inspired the meditations contained in this Article.

1. Robert Maynard Hutchins, former president of the University of Chicago, once described the continued engagement by each new generation with the great books of the past as a "Great Conversation." Specifically, Hutchins wrote:

Until lately the West has regarded it as self-evident that the road to education lay through great books. No [person] was educated unless he was acquainted with the masterpieces of his tradition. There never was very much doubt in anybody's mind about which the masterpieces were. They were the books that had endured and that the common voice of mankind called the finest creations, in writing, of the Western mind.

In the course of history, from epoch to epoch, new books have been written that have

[T]he scope of these terms and the range of the problems in which they are involved seem to be co-extensive with morality; or, in other words, with the broadest consideration of good and evil in human life, with what is right and wrong for [human beings] not only to do, but also to wish or desire, and even to think.<sup>3</sup>

However, “[f]or some of the great moral philosophers, other terms—such as duty for Marcus Aurelius and Kant, or pleasure and utility for Mill—seem to be more central.”<sup>4</sup> Yet, “for Plato, Aristotle, and Aquinas virtue is a basic moral principle. By reference to it they define the good [person], the good life, and the good society.”<sup>5</sup> But “even for them it is not the first principle of ethics. They define virtue itself by reference to a more ultimate good—happiness. For them the virtues are ordered to happiness as means to an end.”<sup>6</sup>

Authors of the great books—such as Plato, Aristotle, Aquinas, Dante, Hobbes and Spinoza—have discussed and debated the classification of virtues

won their place on the list. Books once thought entitled to belong to it have been superseded; and this process of change will continue as long as [people] can think and write. It is the task of every generation to reassess the tradition in which it lives, to discard what it cannot use, and to bring into context with the distant and intermediate past the most recent contributions to the Great Conversation.

Robert M. Hutchins, *The Great Conversation: The Substance of a Liberal Education*, in 1 GREAT BOOKS OF THE WESTERN WORLD, at xi (Robert Maynard Hutchins ed., 1952). In a similar vein, Professor J. Rufus Fears defined a great book as follows:

- A. A great book has a great theme. It discusses ideas of enduring importance.
- B. A great book is written in language that elevates the soul and enables the mind.
- C. A great book must speak across the ages, reaching the hearts and minds of people far removed in time and space from the era and circumstances in which it was composed. Thus, a great book summarizes the enduring values and ideas of a great age and gives them as a legacy to future generations.
- D. Great books are an education for freedom.

J. RUFUS FEARS, 1 BOOKS THAT HAVE MADE HISTORY: BOOKS THAT CAN CHANGE YOUR LIFE 3 (2005) (course transcript) (available for purchase at <http://www.teach12.com>).

2. According to the practical philosopher, Mortimer J. Adler, “virtue and vice”—two philosophical themes—are categorized as one of the 102 “great ideas” that have been discussed in the “great books” over the millennia. A sampling of some of these other great ideas, in alphabetical order, are as follows: Angel, Aristocracy, Art, Cause, Change, Courage, Dialectic, Experience, Family, Fate, God, Government, Language, Law, Mathematics, Matter, Mind, Nature, Progress, Reasoning, Space, Truth, and Wisdom. Mortimer J. Adler, *Table of Contents*, in 2 GREAT BOOKS OF THE WESTERN WORLD, *supra* note 1, at ix-x; 3 GREAT BOOKS OF THE WESTERN WORLD, *supra* note 1, at vii.

3. 3 GREAT BOOKS OF THE WESTERN WORLD, *supra* note 1, at 3.

4. *Id.*

5. *Id.*

6. *Id.*

and the correlative vices over the centuries.<sup>7</sup> Thus, in the tradition of the great books, thinkers through the ages have attempted to divide the virtues according to the parts or powers of the soul. They have made distinctions between moral virtue and intellectual virtue and even propounded theories of the so-called cardinal virtues.<sup>8</sup> Moreover, a variety of other issues about virtue has taken up barrels of ink and forests of trees in the great books. Some of these miscellaneous virtue topics include: the order and connection of the virtues; the causes and conditions of virtue (including the process of habit formation); the psychological factors in the creation of moral virtue (including the roles of pleasure and pain and desire); virtue as compared to other moral goods or principles (such as duty and virtue, honor and virtue, and wealth and virtue); the role of virtue in political theory (such as civic virtue and the qualities which constitute a good or successful ruler); the religious dimensions of virtue and vice (including the moral consequences of original sin, divine reward for virtue and punishment for vice, the nature of theological virtues); and the relative advance or decline of human morality.<sup>9</sup>

In recent years, modern philosophers have tried to reconceptualize virtue ethics by focusing on the formation of virtues in specific beings and concrete human situations.<sup>10</sup> Notable works by philosophers in the modern virtue ethics tradition include books by Philippa Foot, Alasdair MacIntyre, Martha Nussbaum, Gabriele Taylor and Bernard Williams.<sup>11</sup> Moreover, during the 1980s and 1990s,

7. See *id.* at 988-89 for bibliography.

8. See *id.* at 983.

9. See *id.* at 983-84.

10. See *infra* notes 11-18 and accompanying text.

11. See PHILIPPA FOOT, *VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY* (1978); ALASDAIR C. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981); MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* (1986); GABRIELLE TAYLOR, *PRIDE, SHAME, AND GUILT: EMOTIONS OF SELF-ASSESSMENT* (1985); BERNARD WILLIAMS, *MORAL LUCK: PHILOSOPHICAL PAPERS, 1973-1980* (1981). University of Michigan philosophy professor, Peter Railton, traced the neglect of virtue ethics during most of the twentieth century and a renaissance of renewed interest in recent years in a book chapter. See Peter Railton, *Toward an Ethics That Inhabits the World*, in *THE FUTURE FOR PHILOSOPHY* 265 (Brian Leiter ed., 2004). According to Railton:

Dissatisfaction with the limited conception of moral action available to duty-based approaches to moral practice, and with the relative impoverishment of prevalent philosophical treatments of the role of emotion and motivation in moral thought, helped stimulate a revival of interest in virtue theories toward the end of twentieth century. Virtue theory had been influential in moral philosophy from ancient times into the early modern period, but it nonetheless suffered neglect in the twentieth century, partly because of incompletely-formulated doubts about whether such theories could really "add" anything to a proper account of moral obligation. It was felt that moral virtue either was a matter of *possessing* "non-cognitive" motivations or feelings not under conscientious voluntary control—"being brave", say—and therefore outside the scope of a properly moral "ought", or it was a matter of striving *conscientiously toward*



a few legal scholars interested in legal ethics wrote about the personhood of lawyers and specific risks to lawyers' character and moral development by the decisions they make (or failed to make),<sup>12</sup> by the ideals they cultivated (or failed to cultivate),<sup>13</sup> and by the moral responsibility they exercised (or neglected to exercise).<sup>14</sup> A symposium published in 2002 by *Notre Dame Law Review* in honor of the scholarship of Professor Thomas Shaffer did an excellent job of explaining virtue ethics theory and the law and delving deeply into essential moral qualities needed by modern American lawyers.<sup>15</sup>

Personally, I have been enthralled with various facets of law and virtue ethics. For example, within the last few years, I published articles that seek to explore what it might be like to describe a virtuous legislator.<sup>16</sup> Also, turning to the intertwined ethical and legal roles imposed by the Constitution on the President of the United States by the Presidential Oath Clause, I sketched out a theory of "presipudence" "to describe the systematic analysis of all public legal actions, legal statements and interpretations of law that the President of the United States engages in within the framework of jurisprudential philosophies about the role and nature of law."<sup>17</sup> The culmination of my thinking on the topic

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developing such valuable motivations or feelings or acting in accord with them—"trying to be brave" or "trying to act bravely", say—, in which case a theory of obligation could already incorporate it.

*Id.* at 271.

12. See, e.g., RAND JACK & DANA CROWLEY JACK, *MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS* (1989).

13. See, e.g., ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

14. See, e.g., THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (1994).

15. Two articles in this symposium are elucidating: Marie A. Failinger, *Is Tom Shaffer a Covenantal Lawyer?*, 77 NOTRE DAME L. REV. 705 (2002), and Reed Elizabeth Loder, *Integrity and Epistemic Passion*, 77 NOTRE DAME L. REV. 841 (2002).

16. Robert F. Blomquist, *The Good American Legislator: Some Legal Process Perspectives and Possibilities*, 38 AKRON L. REV. 895 (2005). For a more particularized foray in pursuit of describing a virtuous environmental law legislator, see Robert F. Blomquist, *In Search of Themis: Toward the Meaning of the Ideal Legislator—Senator Edmund S. Muskie and the Early Development of Modern American Environmental Law, 1965-1968*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 539 (2004); Robert F. Blomquist, *Senator Edmund S. Muskie and the Dawn of Modern American Environmental Law: First Term, 1959-1964*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 509 (2002); Robert F. Blomquist, *Nature's Statesman: The Enduring Environmental Law Legacy of Edmund S. Muskie of Maine*, 24 WM. & MARY ENVTL. L. & POL'Y REV. 233 (2000); Robert F. Blomquist, *"To Stir Up Public Interest": Edmund S. Muskie and the U.S. Senate Special Subcommittee's Water Pollution Investigations and Legislative Activities 1963-66: A Case Study in Early Congressional Environmental Policy Development*, 22 COLUM. J. ENVTL. L. 1 (1997).

17. Robert F. Blomquist, *The Presidential Oath, The American National Interest and a Call for Presipudence*, 73 UMKC L. REV. 1, 50 (2004). I had the honor of having this article cited by

of law and virtue ethics is a book manuscript entitled *Lawyerly Virtues*.<sup>18</sup>

In this Article, I will turn my attention to the special ethical context of public lawyers. Part I of the Article defines what it means to be a public lawyer in the United States. Part II provides a synopsis of my take on the ten most important lawyerly virtues. This discussion ranks the top ten lawyerly virtues and explains why they are important for all types of lawyers (and for law students) to cultivate and to master. Finally, Part III provides some brief meditations on a few of the unique challenges faced by American public lawyers in grasping and applying the ten lawyerly virtues to their professional lives.

## I. WHAT IS AN AMERICAN PUBLIC LAWYER?

### A. Definitional and Historical Background

We start our analysis of the meaning of a "public lawyer" by considering the definition of "public." According to the *Oxford English Dictionary* ("OED"), the broadest definition of "public" is "the opposite of private" and "[o]f or pertaining to the people as a whole; that belongs to, affects, or concerns the community or nation; common, national, popular."<sup>19</sup> That venerable source of etymological scholarship candidly observes that "[t]he varieties of sense are numerous and pass into each other by many intermediate shades of meaning."<sup>20</sup> Thus, some of the various uses of "public" include: *public act or bill*,<sup>21</sup> *public office*,<sup>22</sup> *public opinion*,<sup>23</sup> *public service*,<sup>24</sup> *public menace or nuisance*,<sup>25</sup> *public interest*,<sup>26</sup> *public utility*,<sup>27</sup> and *public sector*.<sup>28</sup> Moreover, various hyphenated words have evolved in English usage, focusing on facets of publicness: *public-heartedness*, *public-mindedness*, *public-voiced*, and *public-spirited* are some prominent examples.<sup>29</sup>

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U.S. Supreme Court Justice Antonin Scalia. See *McCreary County Ky. v. Am. Civil Liberties Union of Ky.*, 125 S. Ct. 2722, 2748 (2005) (Scalia, J., dissenting).

18. ROBERT F. BLOMQUIST, *LAWYERLY VIRTUES* (Oct. 1, 2005) (unpublished book, on file with author).

19. XII THE OXFORD ENGLISH DICTIONARY 778 (2d. ed. 1989).

20. *Id.*

21. "[A] parliamentary act or bill which affects the community at large[.]" *Id.* at 779.

22. "[A] building or set of buildings used for various departments of civic business . . ." *Id.*

23. "[T]he opinion of the mass of the community . . ." *Id.*

24. "[S]ervice to the community, [especially] under the direction of the government or other official agency; consideration of the common good . . ." *Id.*

25. "[A]nyone or anything obnoxious or annoying to the community." *Id.*

26. "[T]he common well-being . . . Also, public welfare." *Id.*

27. "[A] service or supply, such as electricity, water, or transport, considered necessary to the community, [usually] controlled by a (nationalized or private) monopoly and subject to public regulation." *Id.*

28. "[T]hat part of an economy industry, etc., which is controlled by the state at any level of government." *Id.*

29. *Id.* at 781. One of the more quaint uses of "public" relates to English university tradition:

The aforementioned etymology provides a useful context for the OED definition of *public law*: "that part of the law pertaining to the state and its relationship with the person subject to it."<sup>30</sup>

Every first year law student hears his or her professors making a distinction between "private law" (exemplified by subjects like contracts, torts and property), "encompass[ing] law that principally emerges from disputes between private individuals,"<sup>31</sup> and public law controversies, involving the common well-being of a society. In private law disputes, "[t]he focus, typically, is on resolving a particular controversy within a set of rules evolved"<sup>32</sup> for the purpose of advancing such private interests as autonomy, low transaction costs and reasonableness. "The basis for these [private law] rules often is the common law, although there are now many statutes that supply the governing law—for example the Uniform Commercial Code applies to many contract cases."<sup>33</sup> Alternatively, "[s]ome of the great public law areas, which invariably involve governmental bodies, are subjects like administrative law and other regulatory law"<sup>34</sup>—such as environmental law, telecommunications law, and food and drug law.

The public law subjects usually find their roots in legislation or constitutions. Court decisions in the public law area represent judicial efforts to resolve disputes about such questions as the meaning of statutes, and whether regulations promulgated by administrative agencies fit within the purpose of the statutes under which they were issued.<sup>35</sup>

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"Belonging to, made or authorized by, acting for or on behalf of, the whole university (as distinguished from the colleges or other constituents): as public disputation, examination, lecture, schools, hall, theatre, library . . ." *Id.* at 779 (italics omitted).

30. *Id.*

31. HELENE SHAPO & MARSHALL SHAPO, *LAW SCHOOL WITHOUT FEAR* 12 (2d ed. 2002).

32. *Id.*

33. *Id.*

34. *Id.* (internal quotation marks omitted).

35. *Id.* As the authors explain in detail:

Courts dealing with [public law] problems of this sort do not start with rules that they have developed themselves—that is, common law. They begin, instead, with enacted law such as legislation and constitutions. When questions arise about the interpretation of legislation, *the main issue usually is what the legislature, acting on behalf of the political community as a whole, should be taken to mean by a statute.* . . .

When you study public law and statutes generally, you should keep in mind how powerfully some legislation manifests the deeply held views of the electorate. Consider legislation as technical as the Internal Revenue Code. The rates of taxation it sets, the exemptions it creates, the deductions it allows—all these represent highly political declarations of preference about such matters as the distribution of wealth in society and the desirability of particular activities. . . .

Another facile way of distinguishing between the concepts of public law and private law is to think of them as spheres. As explained by Michael Taggart, the "public law sphere" has a "starting premise [which] is public or other-regarding behaviour," while the "private law sphere" has a "starting-point [which] is self-regarding behaviour."<sup>36</sup> Perhaps the most scholarly exposition of the difference between public law and private law was articulated by the late Professor Rudolf B. Schlesinger (my Civil Procedure professor at Cornell). According to Schlesinger, the ancient Roman text of the Emperor Justinian's *Corpus Iuris* "centered on private law, and public-law issues were discussed, where appropriate within the framework of private law analysis."<sup>37</sup> Some important examples of ancient Roman public law "included rules governing public property such as roads and waterways, and contracts made by public authorities. The special nature of these rules was frequently explained in terms of *utilitas publica*, or public concern."<sup>38</sup> The law of ancient Rome evolved in the countries of continental Europe. "Public law as a discrete [modern] subject essentially . . . [was] the twin product of the early-modern territorial state and the Reformation"<sup>39</sup> of the sixteenth century. Public law as a continental European field of study, in turn, branched into several discrete streams, explained by Schlesinger as follows:

[Starting in the 16th century], [w]hile Roman law continued to furnish the basic vocabulary and some key notions, early modern public lawyers based their craft mainly on neo-Aristotelian "politics," natural-law theory, Machiavellian or anti-Machiavellian literature or statecraft and Staatsraison, and more immediately, the actual texts of charters, privileges, capitulations, pacts and enactments. As the European state-system moved away from imperial and papal supremacy to the sovereign equality of independent territorial states interconnected by treaty and diplomatic relations, public lawyers became active as diplomats and as authorities on public international law. Several of the initial chairs of

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Other kinds of legislation do not even mask their social purposes: statutes prohibiting discrimination on the basis of race and gender, laws restricting the conduct of both employers and workers in labor disputes, legislation requiring notification of the parents of minors seeking abortions. When you deal with the rules embodied in statutes of this kind, you know you are dealing with public law.

*Id.* at 12-13 (internal quotation marks omitted) (emphasis added). Cf. MARTIN LOUGHLIN, *THE IDEA OF PUBLIC LAW* (2004) (arguing that public law must be treated as a special and autonomous subject and that the root cause of many of the difficulties and controversies that have arisen within both contemporary jurisprudence and also in the practice of public law have arisen because this argument has been neglected).

36. Michael Taggart, *The Nature and Functions of the State*, in *THE OXFORD HANDBOOK OF LEGAL STUDIES* 101, 106 (Peter Cane & Mark Tushnet eds., 2003).

37. RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW* 272 (6th ed. 1998).

38. *Id.* at 272-73 (footnotes omitted).

39. *Id.* at 273 (footnote omitted).

public law created in the 18th century (e.g., Edinburgh 1708) encompassed the "law of nature and of nations" in addition to public law generally.

By the 19th century, public international law had distinguished itself as a distinct academic specialty. The practice of adopting formal instruments of government called "constitutions," which the United States initiated in 1787 and which generally caught on in 19th-century Europe and Latin America, gave rise to national constitutional law as a separate discipline, with its own professorships, treatises, and doctrinal systems. Reflecting the need for systematizations of increasingly complex governmental operations affecting individual and group rights and interests, administrative law came into its own later that century.<sup>40</sup>

### *B. A Modern Functional Approach*

The legendary late Professors Henry M. Hart, Jr., and Albert M. Sacks, in their enduring classic, *The Legal Process: Basic Problems in the Making and Application of Law*,<sup>41</sup> provide assistance in the search for a modern, practical conception of what it means to be an American public lawyer. First, their description of "[g]overnment lawyers"<sup>42</sup>—what we might amplify to encompass full-time, professional staff attorneys for public officials of federal, state, or local governmental bodies (executive, legislative, or judicial)—takes in a broad swath of what we would unanimously recognize as being public lawyers. As eloquently explained by Hart and Sacks:

Government lawyers, of course, have a wide variety of responsibilities as advisers to other officials . . . These responsibilities are akin to those of a private lawyer when he [or she] advises a private client, and they include the same inescapable residuum of personal responsibility which is inherent in the exercise of any profession. *Indeed, in the case of a government lawyer this personal responsibility not merely to give accurate advice but to try to guide decision so as to keep it within proper bounds has a special urgency, for a lawyer's client is not merely the official whose action is immediately in question but the government of which the official is a part and in some sense the whole society for which the government speaks.* Nevertheless, the power and the ultimate responsibility of decision in these situations belong to the official whom the lawyer advises. The lawyer acts essentially in a staff capacity, and has always to remember this.<sup>43</sup>

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40. *Id.* at 274-75 (footnotes omitted).

41. Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1047 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958).

42. *Id.*

43. *Id.* (emphasis added).



Second, Professors Hart and Sacks offer a more refined description of a fairly narrow category of American public lawyers: "When, however, the lawyer himself [or herself] is given the power of decision, he [or she] becomes a distinct and separately functioning unit in the institutional system, and this fact warrants special attention to his [or her] role in the operation of the system."<sup>44</sup> Thus, most prominently, lawyers who hold high public office (the President of the United States, Vice President of the United States, members of the President's cabinet and subcabinet, members of Congress, federal judges and magistrates, the governor and other statewide elected officials, members of a governor's cabinet or subcabinet, members of the state legislature, and state court judges) are public lawyers with a special public trust.<sup>45</sup> Moreover, lawyer-officials, like an attorney general or a prosecutor, have uniquely important functions to perform as public lawyers. Thus, an attorney general (of the United States or of a state) is viewed as "the chief law officer" of a jurisdiction, and has responsibilities which include "preparing formal legal opinions," suing on behalf of the government in various civil and criminal matters, "defen[ding] of lawsuits against the government," "interven[ing] on the government's behalf," and "appear[ing] as an *amicus curiae* in private litigation."<sup>46</sup> A prosecutor makes vital decisions "in determining whether to institute [criminal] litigation on the government's behalf."<sup>47</sup>

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44. *Id.*

45. See generally AMERICA'S LAWYER-PRESIDENTS: FROM LAW OFFICE TO OVAL OFFICE (2004) (discussing how the experiences of America's twenty-five lawyer-presidents affected and shaped their presidencies).

46. HART & SACKS, *supra* note 41, at 1047.

47. *Id.* at 1048. Referring to the awesome power and responsibility of a government prosecutor, Attorney General (later Justice) Robert Jackson wrote:

There is a most important reason why the prosecutor should have . . . a detached and impartial view of all groups in his community. Law enforcement is not automatic. It isn't blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff would be inadequate. We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning. What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.

If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor; that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then

Besides government lawyers at the federal and state levels, Professors Hart and Sacks show us—through a series of problems in their book—that attorneys for a local government body, such as a city solicitor or counsel to a municipal health commissioner, can face potentially far-reaching responsibilities as public lawyers. Thus, in one problem, Hart and Sacks, show how an attorney rendering advice on the enforcement of an ordinance on the hygiene of housing might be called upon to render difficult advice, implicating constitutional rights of regulated parties, in inspecting private dwellings for ordinance violations; might be asked for practical administrative input on designing a housing hygiene program; might be queried on what types of exemptions or postponements of enforcement should be viewed as a special hardship—and the like.<sup>48</sup> In another problem on public law responsibilities of municipal lawyers, Hart and Sacks explore the complexities of the breadth and depth of legal and policy advice that an attorney representing a municipal health commission considering amending its administrative regulations should be prepared to encounter.<sup>49</sup> I appreciate and

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looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of [the] prosecutor himself.

*Id.* at 1058 (citation omitted).

48. Problem No. 41, *Administrative Enforcement: An Experiment in Novel Techniques*, *id.* at 1061-74.

49. Problem No. 42, *Issuing an Administrative Regulation: Bathtubs in Baltimore*, *id.* at 1074-83. Some of the complex issues facing such a municipal public lawyer are suggested by Hart and Sacks as follows:

The Commissioner of Health has ordered that public hearings be held on the proposed regulations, so that he can hear from all interested groups prior to deciding whether to adopt the proposals.

The Commissioner asks you to assist him in preparing for the hearing. What witnesses should he invite and what facts should he try to ascertain as bearing on the desirability of the proposals? What considerations need to be taken account in arriving at a decision?

*Id.* at 1075. Moreover, the good local public lawyer advising a municipal health commissioner should be prepared for even more challenging public law questions from his client, as Hart and Sacks explain:

Assume that the [municipal health] regulatory scheme, even if useful, will be inadequate. What other devices are available to carry out the program? Consider the following:

(a) Inducements to private action may include an educational campaign, favorable tax treatment, government loans at low interest rates, provision of technical assistance to the



admire the wisdom of Hart and Sacks in describing and prescribing the multiple responsibilities that public lawyers face every day—from the White House to the local school board. Reflecting on my former personal experience as counsel for several school boards and for a local planning board in New Jersey, I can personally attest that the role of being a public lawyer—even, as it was for me, part-time and in addition to my duties as a private lawyer with a diverse clientele of private parties—is both daunting and exhilarating.

*C. Stretching the Limits: Public Law Dimensions of Private Lawyering*

If we were to take a capacious view of what it means to be a public lawyer, we would have to consider a few other matters. First, in 1921, a Carnegie Foundation study entitled *Training for the Public Profession of the Law* suggested eponymously that all lawyers are in some sense public lawyers because of the centrality of the practice of law to American government and social order.<sup>50</sup> This view has been carried forward in state rules of professional conduct. Indiana's approach is illustrative. Indeed, consider the public lawyer intonations in the preamble to *Indiana's Rules of Professional Conduct*:

- [1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Whether or not engaging in the practice of law, lawyers should conduct themselves honorably.
  
- [6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer

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homeowner in planning his repairs, and perhaps regulation and supervision of building contractors to give assurance that all work is adequately done at a fair price. Note that these various inducements may present distinctive problems of their own.

(b) Municipal action in providing new or improved public facilities and services, including better streets, parks, lighting, trash collection, etc.

(c) Condemnation of properties for the purpose of having the necessary repairs done either with public funds or by private persons who buy the property from the municipality under an agreement to make such repairs.

*Id.* at 1082-83.

50. See discussion in *THE OXFORD COMPANION TO AMERICAN LAW* 280 (Kermit L. Hall ed., 2002).

should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.<sup>51</sup>

Second, "even private law has public law aspects."<sup>52</sup> To be sure, "[o]nce courts employ notions of public policy in judging private disputes, explicitly taking into account the broader consequences of their decisions, they are importing 'public' characteristics into private law."<sup>53</sup> And public policy analysis—as a type of legal argument—has assumed great importance in recent years. For instance, Professor Wilson Huhn has suggested that policy arguments in the law have an appealing, modern sensibility because—unlike argumentation that looks chiefly to the past as authority for a legal proposition—public policy focuses our attention on the future.<sup>54</sup> By way of further illustration of the increasing concern for broadening our understanding of the social consequences of law, Professor Lynne L. Dallas has edited an entire casebook on law and public policy; among the policy-laden, wide-ranging, future-oriented topics that she explores are law and cognitive psychology, economic fairness and well-being, norms and the law, and the role of cooperation and trust in legal constructs and institutions.<sup>55</sup>

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51. INDIANA RULES OF PROF'L CONDUCT, Preamble ¶¶ [1], [6] (2005).

52. SHAPO & SHAPO, *supra* note 31, at 13 (citing Leon Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 1 (1959); 38 TEX. L. REV. 257 (1960)) (internal quotation marks omitted).

53. *Id.* For my own take on the public policy/public law dimensions of modern tort law, see Robert F. Blomquist, *Re-Enchanting Torts*, 56 S.C. L. REV. 481 (2005).

54. WILSON HUHN, *THE FIVE TYPES OF LEGAL ARGUMENT* 51 (2002).

55. LAW AND PUBLIC POLICY: A SOCIOECONOMIC APPROACH (Lynne L. Dallas ed., 2005). Dallas's take on public policy is explained as follows:

This textbook provides rich course materials that permit students to explore in a variety of contexts the interrelationships between law and economic/social processes. It critiques neoclassical economics and draws on diverse economic approaches and other social sciences, such as psychology, sociology, anthropology and political science, for the tools of public policy analysis. It offers students a values-based approach to public policy that is designed to take into account the power implications and distributional effects of laws, and stresses the importance to effective regulation of attention to historical context, philosophical beliefs, culture, existing institutions, working rules and

Third, with the trend in recent decades of the prominence of non-governmental organizations ("NGOs"), and their need for *pro bono* legal representation in pursuing public missions, ranging from environmental protection to advocacy for the disabled, from child welfare to historic preservation, lawyers who take on these charitable clients will be called upon to consider broad questions of public interest. Thus, it may be the case that the traditional dichotomy between the public interest serving role of attorneys for governmental entities and the appropriate professional role for attorneys for non-governmental parties will continue to blur in the future.<sup>56</sup>

## II. TEN VITAL LAWYERLY VIRTUES

### A. *To Be Positive or Negative?*

One way of approaching the general question of what it means to be a "good" or "worthy" lawyer would be to back into the subject, so to speak, by identifying the key vices we would want our ideal lawyer to avoid. Thus, a potential way of describing a virtuous lawyer might be to catalog bad qualities—like greed, sloth, or anger, for example—for our worthy lawyer to avoid. What is left, like a cardboard silhouette portrait, would define our legal professional.<sup>57</sup> Although such a negative approach would provide us with a general notion that an ideal lawyer should aspire to achieve the opposite of the prohibited vice (e.g., to avoid anger and seek calmness; to avoid sloth and try to be diligent), a more positive approach of trying to articulate specific characteristics of a good lawyer is more appealing. In the first place, a positive description allows us to focus on—and better visualize—the key attributes of specific virtues and why they are important for lawyers to strive to master. In the second place, focusing on private virtues instead of negative vices allows us to move toward a vision of an ideal image instead of away from the specter of a boogeyman. In my judgment, more people

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sources of power.

*Id.* at xxiv. Compare Dallas's book with the similarly free-wheeling, values-oriented approach—from a political scientific perspective—of FRANK FISCHER, *REFRAMING PUBLIC POLICY: DISCURSIVE POLITICS AND DELIBERATIVE PRACTICES* (2003) (containing a special emphasis on a deeper understanding of language and discourse in the formulation of public policy).

56. Cf. Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest*, 41 B.C. L. REV. 789, 796 (2000) (discussing that "[t]he traditional understandings of the [public interest serving] role for attorneys for private parties . . . to take into [some] account the public interest, [but] this responsibility is greatly subordinated to the attorneys' responsibility to advance the individual self interests of their clients").

57. For a fascinating—and often humorous—series of general meditations on six of the seven deadly sins, or vices, see SIMON BLACKBURN, *LUST: THE SEVEN DEADLY SINS* (2004); JOSEPH EPSTEIN, *ENVY: THE SEVEN DEADLY SINS* (2003); FRANCINE PROSE, *GLUTTONY: THE SEVEN DEADLY SINS* (2003); ROBERT A.F. THURMAN, *ANGER: THE SEVEN DEADLY SINS* (2004); PHYLLIS A. TICKLE, *GREED: THE SEVEN DEADLY SINS* (2004); WENDY WASSERSTEIN, *SLOTH: THE SEVEN DEADLY SINS* (2005).

are motivated by the former instead of the latter. Finally, while lambasting lawyerly vices might yield some brief sardonic laughter (along the lines of a typical lawyer joke),<sup>58</sup> in the long run, extolling virtues is more uplifting and better for the human spirit.

### B. A Ranked List

Every lawyer—private lawyer, public lawyer, or law student/aspiring lawyer—should seek to master ten vital lawyerly virtues in order to perform his or her awesome professional responsibilities in an efficient, effective, and honorable manner, and for the further purpose of ensuring a sustainable career over time.

I provide below a pithy synopsis of these ten universal lawyerly virtues and a brief explanation of why each virtue is ranked the way that it is on my list.<sup>59</sup>

1. *Balance*.—Psychological and spiritual teachings increasingly suggest that a healthy individual is one who is able to balance his or her *personal life* (health, spouse, lover, children, family, friends) with his or her *professional life* (money, competence, achievement, colleagues, advancement) and with something less concrete than these concerns: *spiritual life*. Being balanced is not quite the same thing as being organized; being organized, though, is a good place to start since it is a bit easier to think about than the abstract quality of balance. Balance, however, is a virtue that goes beyond being organized. Balance is also poise. Balance is control: of one's emotions, of one's work, of one's time, of one's thoughts. It is imperturbability and unruffledness that conveys a fundamental attitude that Rudyard Kipling alluded to in his famous poem, *If*: keeping your head when all around you are losing theirs.<sup>60</sup> Balance is a frame of mind that communicates in a non-verbal way: "I *know* that I know"; "I *care* about you enough to tidy up a bit"; "I am *glad* that I have the opportunity to create some harmony in both of our lives."

Without balance there can be little accomplishment. Doing all the things that lawyers must do with their limited time and daunting demands requires balance. Balancing—as the nineteenth century English poet Samuel Taylor Coleridge

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58. See TED COHEN, JOKES: PHILOSOPHICAL THOUGHTS ON JOKING MATTERS 73-74 (1999) (bold omitted). Cohen explains:

Sometimes the established presumption is not that the principal character is stupid or inept, but that he is disagreeable—mean, nasty, vicious. And sometimes that is all there is to the presumption, as in a number of jokes about . . . lawyers. For instance, . . .

You find yourself trapped in a locked room with a murderer, a rapist, and a lawyer. Your only hope is a revolver you have, with two bullets left. What do you do?

Shoot the lawyer. Twice.

59. For more detailed accounts of these ten lawyerly virtues, see my book, *supra* note 18, and accompanying text.

60. RUDYARD KIPLING 49 (Geoffrey Moore ed., 1992).

reminds us—requires both hard work and imagination. As Coleridge observed:

[Imagination] reveals itself in the balance or reconciliation of opposites or discordant qualities; of sameness, with difference; of the general, with the concrete; the idea with the image; the individual with the representative; the sense of novelty and freshness, with old and familiar objects; a more than usual state of emotion, with more than usual order. . . .<sup>61</sup>

Maintaining balance, then, is the first virtue of a good lawyer since without balance, work, and professional accomplishment become top-heavy and unsustainable over the long haul.

2. *Integrity*.—Integrity is a double-edged virtue for lawyers. In the first place, integrity is all about being *upright*—exhibiting decency, honor, principle, morality, and goodness. The second edge of integrity, however, relates to *wholeness*. Integrity, in this sense, is defined as totality, completeness, unity, oneness, togetherness, coherence, consistency and validity.

To appreciate the importance of integrity to the ultimate success of a lawyer, a brief explanation of Aristotle's theory of rhetoric is instructive.<sup>62</sup> The persuasiveness of any speech, according to Aristotle, depends on a combination of three essential elements that must be blended into a single whole: *logos*, *ethos*, and *pathos*. *Logos* encompasses the logical force of an argument—the facts and figures and inferences and deductions to be drawn from the evidence. *Ethos* is fashioned by the reputation of the advocate—his or her renown for good deeds, truth-telling, and honest dealing. *Pathos* involves the emotional force of the argument—the human drama of conflict and tragedy and of suffering and striving. To Aristotle's way of looking at advocacy, the success or failure of a pleader of causes depends on the unity of logic, reputation, and emotion leading to an unshakable conviction (in the listener) that the champion of an argument is a person of upright character. Aristotle's illuminating theory of persuasion through integrity—rightly understood as the *gravitas* or substance that comes about when the sum of logic, emotion, and reputation turns out to be greater than the sum of the parts—applies to *everything* a lawyer does. There is no better American exemplar of the importance of integrity to the ultimate success of a lawyer than the record of Abraham Lincoln's twenty-three years as a practicing lawyer in Illinois before his election to the presidency in 1860.<sup>63</sup>

3. *Idealism*.—Idealism is the fuel that powers acts of lawyerly service and sacrifice. Every act of idealism—quixotic, romantic, optimistic, starry-eyed, or visionary advocacy for a cause, a person, or an institution—expresses a lawyer's highest self. And every missed opportunity to be idealistic diminishes a lawyer's opportunity to make a difference in his chosen profession.

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61. SAMUEL TAYLOR COLERIDGE, *BIOGRAPHIA LITERARIA*, ch. 14 (1817).

62. For an excellent short book on Aristotle's theory of rhetoric, see MORTIMER J. ADLER, *HOW TO SPEAK HOW TO LISTEN* 29-45 (1983).

63. For a superb account of Lincoln's virtuous life, both as a practicing lawyer and as a statesman, see WILLIAM LEE MILLER, *LINCOLN'S VIRTUES: AN ETHICAL BIOGRAPHY* (2002).



Lawyerly idealism is similar to idealism as a philosophical concept in that both emphasize the importance of "spirit" or "consciousness" in viewing the world.<sup>64</sup> Thus, both the idealistic lawyer and the philosopher of idealism would agree that it is possible to transcend the here and now. In particular, the virtue of idealism allows the lawyer to contend with injustice and bone-headed laws for as long as it takes to reverse a client's misfortune. Moreover, the idealistic lawyer and the philosopher of idealism would join with one another in the Hegelian belief that the universe is governed by a dialectical invisible hand such that even bad can be transcended to produce good.

A proper understanding of idealism for a lawyer requires, in the first place, a facility for shrugging off defeat—for being able to continue to fight the good fight. In the second place, the virtue of lawyerly idealism demands that the accumulation of riches not be the focus of a career in the law. We should be mindful of what the late Robert F. Kennedy (who served as Attorney General of the United States under his brother, Jack, and who was elected a United States Senator from New York) said. According to RFK there is a need "to confront the poverty of satisfaction—a lack of purpose and dignity—that inflicts us all. Too much and too long, we seem to have surrendered community excellence and community values in the mere accumulation of material things."<sup>65</sup> In the third place, idealism in the law requires a youthful attitude. "This world demands the qualities of youth: not a time of life but a state of mind, a temper of the will, a quality of the imagination, a predominance of courage over timidity, of the appetite for adventure over the love of ease."<sup>66</sup>

4. *Compassion*.—According to the Once-ler, a character in my favorite Dr. Seuss book, *The Lorax*, as he surveys a landscape of denuded trees brought about by his own avarice:

"But now," says the Once-ler, "Now that *you're* here, the word of the Lorax seems perfectly clear. UNLESS someone like you cares a whole awful lot, nothing is going to get better. It's not."<sup>67</sup>

Michael N. Dolich, a young Pennsylvanian lawyer who has embraced the concept of being a "holistic lawyer," seems to mirror the Lorax's credo of *caring*. According to Dolich, holistic lawyers understand "how [their] thoughts and actions impact others and the whole world."<sup>68</sup> Holistic lawyers learn that "the quality that elevates us from being a great lawyer and moves us into the next level is *simply caring*."<sup>69</sup> Dolich came to his insight after a period of travel,

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64. For a brief discussion of the importance of spiritual values in law, see Robert F. Blomquist, *Law and Spirituality: Some First Thoughts on an Emerging Relation*, 71 UMKC L. REV. 583 (2003).

65. MAKE GENTLE THE LIFE OF THIS WORLD: THE VISION OF ROBERT F. KENNEDY 79 (Maxwell Taylor Kennedy ed., 1998) (internal quotation marks omitted).

66. *Id.* at 82.

67. DR. SEUSS, *THE LORAX* 60 (1971).

68. Michael N. Dolich, *Finding Joy in the Practice of Law*, 25-FEB. PA. LAW. 34, 38 (2003).

69. *Id.* (emphasis added).

study, and reflection triggered when he quit his lucrative personal-injury law practice, sold his home, and stored all of his possessions in his friend's basement. He made the following startling assertion which, at its heart, emphasizes the importance of lawyerly compassion as a professional virtue:

Most of us are not aware of how meaningful our job really is. I am not writing about an intellectual exercise in how the legal system impacts our culture, for we all know that it does. The new challenge facing our profession is finding a way to experience, in a fully conscious way, how our actions and thoughts impact each and every other person in the never-ending web of relationships called life. In essence, I am referring to the conscious evolution [lawyers must go through] from intellectually knowing our work has meaning into the actual experience and feeling of such meaning. When this happens our work [as lawyers] becomes joyful.<sup>70</sup>

Steven Keeva, author of the book *Transforming Practices: Finding Joy and Satisfaction in the Legal Life*,<sup>71</sup> has pointed out how lawyers' lack of compassion and empathy for clients can get in the way of their ability to render good legal advice and care. As he wrote in a recent article:

My impression, born out in interviews with clients over the years, is that what troubles so many of them is a sense that certain mindsets and attitudes stand between them and the lawyers they hire. Several implied questions are clear including: *why can't they (i.e. lawyers) just talk to me like normal human beings? What is it about practicing law that makes people so unreal, so detached from the rhythms and concerns of everyday life?* I believe the research suggesting that non-lawyers see lawyers "as dominant and aggressive professionals who are lacking in caring and compassion," supports my impression, since "real" people let their guards down now and then and do not frame every situation in dry, legalistic terms. *They understand that people who come to them in need, often at moments of great suffering, can use a strong, but also caring hand.*<sup>72</sup>

5. *Courage*.—Every practicing lawyer will likely face moments when he or she is called upon to face fears, stand up for what is right, or dig down deep to find the mystic fire of courage to do what must be done. Courage is a lawyerly virtue of great importance because lawyers are frequently called upon to represent unpopular clients or causes. And sooner or later a lawyer will have to argue for acceptance of a novel legal argument before a court or legislative body or administrative agency.

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70. *Id.* at 34.

71. STEVEN KEEVA, *TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE* (2002).

72. Steven Keeva, *Practicing From the Inside Out*, 7 HARV. NEGOT. L. REV. 97, 101-02 (2002) (emphasis added) (footnotes omitted).



A good place to start our search for the meaning of lawyerly courage is with the thoughts of a University of Michigan law professor, William Ian Miller, in his book *The Mystery of Courage*.<sup>73</sup> This meditation on courage starts off with a chapter that draws upon a battlefield memoir of a Union soldier during the Civil War. Miller notes that those who have discussed the meaning of courage "place it either first among virtues" or close to the top.<sup>74</sup> He observes, in this regard, that "[c]onstrued narrowly as the capacity to face death in feud or war, courage was frankly granted to be necessary to defending self, family, and one's own against external threat, and thus absolutely crucial to securing the space in which other virtues could develop."<sup>75</sup> Moreover, Miller reflects that courage "[c]onstrued more broadly as fortitude . . . denote[s] a certain firmness of mind, a necessary component"<sup>76</sup> of all virtues. In a fascinating series of questions about the ambiguities of battlefield courage, Professor Miller provides us lawyers with food for thought about the nature of lawyerly courage:

[Courage] is clearly intimately connected with fear, but how? Does true courage mean possessing a fearless character, being a person who "don't scare worth a damn" as one soldier said of Ulysses S. Grant; or does it require achieving a state of fearlessness by overcoming fear so as to send it packing by whatever feat of consciousness or narcotic that can do the trick? Or does overcoming fear mean never quite getting rid of it, but putting it in its proper place so that it doesn't get in the way of duty? Or does it mean being gripped by fear, feeling its inescapable oppressiveness, its temptations for flight and surrender, yet still managing to perform well in spite of it?<sup>77</sup>

We can also gain edification from looking at the quality of political courage as an analogue of lawyerly courage. Indeed, every lawyer should peruse John F. Kennedy's *Profiles in Courage*.<sup>78</sup> This book is instructive for lawyers not only because it portrays an assemblage of politicians who were also trained as lawyers (such as John Quincy Adams, Daniel Webster, and Robert A. Taft) but also because it discusses the kinds of cases and controversies that practicing lawyers—through their representation of controversial clients or causes—sooner or later get involved with.

A final thought in our brief summary of the lawyerly virtue of courage comes from Bruce R. Jacob who calls courage "[o]ne of the most important character traits of outstanding lawyers," a trait, which in his view, is "[c]losely related [to] the trait of independent-mindedness."<sup>79</sup>

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73. WILLIAM IAN MILLER, *THE MYSTERY OF COURAGE* (2000).

74. *Id.* at 5.

75. *Id.*

76. *Id.* (internal quotation marks omitted).

77. *Id.* at 6 (footnote omitted).

78. JOHN F. KENNEDY, *PROFILES IN COURAGE* (1956).

79. Bruce R. Jacob, *Developing Lawyering Skills and the Nurturing of Inherent Traits and Abilities*, 29 STETSON L. REV. 1057, 1058 (2000).

6. *Creativity*.—The virtue of creativity for lawyers is critically important. Yet, for at least three reasons, lawyerly creativity is under-appreciated. One reason is that some view the law as an inherently restraining—rather than a liberating—discipline that necessarily stifles innovation. Second, many observers contend that the need for specialization and sub-specialization (to manage the torrent of complex new statutes, case law, and regulations) compels a narrowness of focus that inhibits inventiveness and originality. A third reason for the conventional professional wisdom that severely discounts the role of creativity in the practice of law is the time pressures faced by every lawyer in America just to keep up and stay reasonably current. If one needs to run just to stay in place, this line of thinking goes, it is unrealistic to expect ingenious and imaginative lawyerly insights.

To the contrary, however, if we shift our perspective a bit, the limitations of the law, the need for specialization, and the constraints of time on the practice of law become environmental forces that compellingly emphasize the need for creativity in the law. In this regard, law can be analogized to the ancient art of rhetoric. Both law and rhetoric involve the study and mastery of the available means of persuasion in a given case. The good lawyer must learn how to creatively navigate amid the constraints posed by his audiences and situations, while remaining poised to take advantage of situational opportunities that present themselves.

Professor Wilson Huhn's masterful book, *The Five Types of Legal Argument*, is, at its heart, a call for lawyerly creativity.<sup>80</sup> Huhn explains that it requires creativity and inventiveness to fashion five basic types of legal argument, applicable across the board in every specialty of law from admiralty to zoning: (1) *text-based arguments*, (2) claims based on *intent*, (3) *precedent-focused contentions*, (4) arguments rooted in *tradition*, and (5) *policy analysis*.<sup>81</sup> Huhn points out in this regard that since "[t]he law is not smooth and pure like distilled water," but, rather, is like a "wild river" that is "fed by tributaries which arise from myriad wellsprings," and in order "[t]o master the law" we must imaginatively "trace each and every legal argument to its source."<sup>82</sup> Utilizing creativity himself, Professor Huhn provides an alternative image of the law as consisting of "different voices."<sup>83</sup> Thus, he concludes that "the greatest challenge we face in studying the law is to recognize and understand each of the voices of the law, and to express ourselves with every voice."<sup>84</sup>

Edward DeBono provides some practical ideas for applying the lawyerly virtue of creativity in our day-to-day lives as professionals. In his brilliant book, *Six Thinking Hats*, DeBono advocates breaking problems down into different

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80. HUHNS, *supra* note 54.

81. See generally *id.* at 13-16 (pointing out that the five types of legal argument: "Arise from Different Sources of Law," "Function as Rules of Recognition," "Are Rules of Evidence for Determining What the Law Is," and "Embody the Underlying Values of Our System of Laws").

82. *Id.* at 3.

83. *Id.*

84. *Id.*

parts and then dealing with each part separately.<sup>85</sup> Different colors are used to describe the different dimensions of a problem: "red for emotions, white for facts, yellow for positive, green for future, black for critique, and blue for process."<sup>86</sup> Applying DeBono's methodology to the practice of law, clinical law professors Weinstein and Morton suggest:

[L]awyers . . . have the tendency to immediately critique ideas with our black hats; if we first explore the emotional aspects of an issue (red hats), it is easier to separate our anger or other feelings from other components of the issue. Or, it might be best to first explore the positive aspects of the problem (yellow hats), if we are dealing with a problem that seems to be *very* negative. It is often good to start with the facts (white hats).<sup>87</sup>

7. *Energy*.—Lawyers require energy to accomplish their busy agendas. The dictionary definition of *energy* informs us of the multiple meanings of the word: "force; vigor; capacity for activity" and "the capacity . . . to do work."<sup>88</sup> Synonyms for *energy* are more revealing: "force, power, strength, might . . . , drive, dynamism, push, *élan*, dash, bounce, brio, zip, go, vim, . . . get-up-and-go, pep, zing, zap, vitality, liveliness, vivacity, animation, . . . spirit, exuberance, zest, gusto, enthusiasm, verve, zeal, . . . oomph, [and] pizzazz."<sup>89</sup>

On a deeper level than dictionary definitions, Professor P.M. Forni has articulated a more practical description of what human energy is all about. Forni speaks of energy in social terms; focusing on a coming out of self to embrace the interests and concerns of others. As he explains:

We now live in an age of idolatry of the Self. We have persuaded ourselves that first and foremost we live to realize our own Selves for our own good. Having made the Self the central concern and value in our lives, we should not be surprised if self-centered behaviors have become more prevalent than altruistic ones. We shouldn't be surprised if civility has suffered. The more we focus on our Selves and our self-gratification, *the less moral energy we have available to spend on others and the less attuned we are to others' well-being*.<sup>90</sup>

Two aspects of Forni's description should resonate with those of us who labor in the law: the implication that people should try to be more altruistic than self-centered, and the notion that energy applied by human beings to fellow human beings is moral in nature. In other words, when a lawyer chooses to

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85. EDWARD DEBONO, SIX THINKING HATS (1985).

86. Janet Weinstein & Linda Morton, *Stuck in a Rut: The Role of Creative Thinking in Problem Solving and Legal Education*, 9 CLINICAL L. REV. 835, 856 (2003) (describing DeBono's book).

87. *Id.* at 856 (emphasis added).

88. THE OXFORD DICTIONARY AND THESAURUS 476 (Am. ed. 1996).

89. *Id.*

90. P.M. FORNI, CHOOSING CIVILITY 169 (2002) (emphasis added).

represent a client or a cause, she or he steps outside of herself or himself to achieve something of importance to another. The tasks of finding, interpreting and using legal materials are actually outside of a client's *real* concerns in the sense that an attorney should strive to frame a client's problem in human terms *before* he or she defines the client's problem in legal terms.

The philosophy of Henri Bergson helps to clarify the importance of energy in a lawyer's day-to-day existence. Bergson coined the phrase *élan vital*. Although a precise meaning of *élan vital* is subject to speculation among philosophers, for our purposes, it can be thought of as "life force" or "vital impetus"<sup>91</sup>—what one writer describes as a "basic energy [that] has no specified or specifiable goal; it is a creative and originating force which produces endless variations of forms against which it then has to contend in order to create further variations."<sup>92</sup> Another formulation of Bergson's philosophy of energy is that "[l]ife is essentially determined in the act of avoiding [or overcoming] obstacles, stating and solving a problem."<sup>93</sup> A lawyer, then, needs to understand that *problem formulation* is a critical part of what he does and that searching for ways to describe and present a client's problem is a difficult and taxing process. Yet, Bergson's insight provides some comfort: he was of the opinion that God is imminent in the world and the prime source of energy. Moreover, "Bergson maintained that God operates with complete freedom in unfolding the process of evolution, that God, like an artist who works completely unrestricted by outside forces, freely chooses each new step of creative activity as he develops successive stages of the evolutionary process."<sup>94</sup>

8. *Justice*.—The lawyerly virtue of justice is dominated by physical and visceral characteristics. A compelling book that supports this presupposition is entitled *The Sense of Justice: Biological Foundations of the Law*.<sup>95</sup> According to Margaret Gruter, although "law [is] both . . . a creation of the human mind and . . . a product of the biological mechanisms that support and make possible the human quest for order and justice,"<sup>96</sup> the human "sense of justice" seems to be hard-wired into our very makeup as human beings. As Roger D. Masters asserts, what a human tends to have as a natural component of his or her being "combine[s] elements of passion and reason, emotion and cognition, or feeling and judgment . . . [involving] a sense of justice, a sense that is ever present yet manifest in different ways from case to case."<sup>97</sup>

91. See generally HENRI BERGSON, CREATIVE EVOLUTION (A. Mitchell trans., 1928).

92. DIANE COLLINSON, FIFTY MAJOR PHILOSOPHERS: A REFERENCE GUIDE 132 (1987).

93. GILES DELEUZE, BERGSONISM 16 (Hugh Tomlinson & Barbara Habberjam trans., Zone Books 1988).

94. WILLIAM S. SAHAKIAN & MABEL LEWIS SAHAKIAN, IDEAS OF THE GREAT PHILOSOPHERS 95 (1993).

95. THE SENSE OF JUSTICE: BIOLOGICAL FOUNDATIONS OF LAW (Roger D. Masters & Margaret Gruter eds., 1992) [hereinafter THE SENSE OF JUSTICE].

96. Margaret Gruter, *Preface* to THE SENSE OF JUSTICE, *supra* note 95, at vii.

97. Roger D. Masters, *The Problem of Justice in Contemporary Legal Thought*, in THE SENSE OF JUSTICE, *supra* note 95, at 3.

For a lawyer, the virtue of justice is vital. Some might argue that a just lawyer is a tautological concept—how could a lawyer be other than just? And yet, from the lay public's perspective, the legal profession is *dominated* by lawyers who lack a sense of justice. Those who hold this view embrace the negative beliefs that lawyers care more about getting money for themselves than doing right for their clients; that lawyers will distort the facts and warp the law in pursuit of wealth maximization for themselves. This is the very antithesis of seeking justice.<sup>98</sup>

Despite many bad apples in the legal profession, I am convinced that there are more good lawyers who believe in and actively pursue justice. Indeed, many American lawyers provide *pro bono* representation for needy individual and nonprofit organizations. They willingly undertake hours of unpaid legal labor with no expectation other than seeking justice for an underdog. Nonetheless—almost as if the universe responds to generosity by giving back interesting experiences, challenging work and, sometimes, paying clients—a lawyer will sometimes do well by doing good. An illuminating book that supports this assertion is *Inside: A Public and Private Life*<sup>99</sup> by Joseph A. Califano, Jr. Califano started his legal career in government service during the Kennedy and Johnson administration, and his governmental perspective and political involvement allowed him to gain experience for a very influential case. He represented the Democratic National Committee ("DNC"), without a fee, during the early 1970s in a civil action against various Republican Party officials in the Nixon Administration involved in the illegal break-in of the DNC Headquarters in the Watergate Building. This public-spirited legal work was its own reward for Califano, but it also led to exposure and publicity that netted some influential, fee-paying clients for his law firm. Moreover, when Jimmy Carter won election to the White House in 1976, Califano was appointed Carter's Secretary of Health, Education and Welfare.<sup>100</sup>

Philosopher André Comte-Sponville observed that the virtue of justice is unique and yet elusive.<sup>101</sup> He says, in pragmatic fashion, that "just people are those who do not know what justice is and who recognize that they do not know it; they render justice as best they can, not exactly blindly . . . but with an understanding of the risks (more for others than for themselves) and the

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98. St. John's University law professor Lawrence Joseph has written a book—a cautionary tale about lawyers who have lost their sense of justice—that every lawyer in America should read (and re-read). See LAWRENCE JOSEPH, *LAWYERLAND: WHAT LAWYERS REALLY TALK ABOUT WHEN THEY TALK ABOUT LAW* (1997). Professor Joseph portrays a hodge-podge of grasping, self-absorbed, money-obsessed, petty, vindictive, and hollow attorneys who sneer or despise the idea that lawyers should be concerned about doing justice.

99. JOSEPH A. CALIFANO, JR., *INSIDE: A PUBLIC AND PRIVATE LIFE* (2004).

100. Califano's public lawyer experiences as HEW Secretary are detailed in his excellent book, JOSEPH A. CALIFANO, JR., *GOVERNING AMERICA: AN INSIDER'S REPORT FROM THE WHITE HOUSE AND THE CABINET* (1981).

101. ANDRÉ COMTE-SPONVILLE, *A SMALL TREATISE ON THE GREAT VIRTUES* 61 (Catherine Temerson trans., 1st Am. ed. 1996).



uncertainties.”<sup>102</sup> With French insight and élan, Sponville claims:

The Self is unjust in itself, writes Pascal, since it makes itself the center of everything; it is inconvenient to others since it would enslave them; for each self is the enemy and would like to be the tyrant of all others. Justice is the opposite of this tyranny, and hence (like other virtues) the opposite of, or the refusal to give into, selfishness and self-centeredness.<sup>103</sup>

9. *Discipline*.—According to management and inspirational guru Stephen R. Covey, discipline is an essential virtue for those who want to succeed in business and in life.<sup>104</sup> As he explains in his most recent book: “*Discipline* is paying the price to bring vision into reality. It’s dealing with the hard, pragmatic, brutal facts of reality and doing what it takes to make things happen.”<sup>105</sup> Moreover, according to Covey, “[d]iscipline arises when vision joins with commitment. The opposite of discipline and the commitment that inspires sacrifice is *indulgence*—sacrificing what matters most in life for the pleasure or thrill of the moment.”<sup>106</sup> Covey illustrates his conception of the disciplined individual (combining virtues of vision, conscience, and passion) with the biographies of George Washington, Florence Nightingale, Mohandas K. Gandhi, Margaret Thatcher, Nelson Mandela, and Mother Teresa.<sup>107</sup>

Poet Gary Snyder implicitly suggests a partially-western, partially-eastern definition of discipline as part of a learned craft when he talks of what is required for an apprentice. For aspiring Japanese potters or carpenters, for instance, Snyder notes that the first things they will learn are how to mix clay or how to properly sharpen chisels and planes before they even begin the process of shaping or creating.<sup>108</sup> According to Snyder, this disciplined craft learning is structural and cross-disciplinary, so the following insights apply to aspiring lawyers as well as aspiring mechanics, cooks, carpenters, and poets:

A master is a master. If you saw a man who was a master mechanic you’d do better—say you wanted to be a poet, and you saw a man that you recognized is a master mechanic or a great cook. You would do better, for yourself as a poet, to study under that man than to study under another poet who was not a master, that you didn’t recognize as a master.

102. *Id.* at 67.

103. *Id.* at 74 (footnotes omitted) (internal quotation marks omitted).

104. He emphasized the centrality of disciplined habit formation in his classic book, STEPHEN R. COVEY, *THE 7 HABITS OF HIGHLY EFFECTIVE PEOPLE* (1989).

105. STEPHEN R. COVEY, *THE 8TH HABIT: FROM EFFECTIVENESS TO GREATNESS* 65-66 (2004).

106. *Id.*

107. *Id.* at 68-70.

108. *THE POET’S WORK: 29 POETS ON THE ORIGINS AND PRACTICE OF THEIR ART* 286 (Reginald Gibbons ed., 1979).

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Not only a true poet but a master—a *real* craftsman. There are true poets who can't teach because . . . they're not grounded in details. They don't *really* know the materials. A carpenter, a builder knows what Ponderosa pine can do, what Douglas fir can do, what Incense Cedar can do and builds accordingly. You can build some very elegant houses without knowing that, but some of them aren't going to work ultimately.

And so, I'm saying that behind the scenes there is the structural and the fundamental knowledge of materials in poetry, and learning from a master mechanic would give you some of those fundamentals as well as studying from an academician, say.<sup>109</sup>

As Gary Snyder sees it, a true "apprentice"—unlike the showy, brassy, reality TV version of the word—would take humble pains to master the details of his or her craft. Snyder's comments call on us to be mindful of details in our craft of the law: the details of step-by-step processes for accomplishing tasks; the details of the roots, branches, twigs, and leaves of knowledge in particular legal fields; the detailed exertions of a daily regimen; and the details of changing old, out-dated ways of doing things in favor of newer, more efficient, and more effective approaches to legal problems.

10. *Perseverance*.—A wise man once summed up the meaning of perseverance with a metaphor to a woodchopper: "Many strokes overthrow the tallest oaks."<sup>110</sup> Thus, one who perseveres continues a task "steadfastly or determinedly" persisting through what may come.<sup>111</sup> A word related to *persevere* is *persistent*, the latter meaning "continuing obstinately," "enduring," and in a scientific connotation when referring to horns or leaves, as "remaining instead of falling off in the normal manner."<sup>112</sup>

A dictionary listing or thesaurus cannot adequately convey the meanings of the human virtues of perseverance and persistence. I remember a case that I encountered early in my career as a lawyer, involving a marketing company, a disgruntled former employee, and a contractual covenant not to compete. Happily, the litigation ended with an amicable settlement between the parties. I do not even remember the precise facts or issues in the case. What I do remember is an inspirational quotation that my client—the owner of the marketing company—had printed up in fancy lettering and made sure all of his sales representatives took on the road to help them through the hard times. A former client gave me a quotation that I have had affixed to my office wall for the last twenty years. I learned later that the quote is attributable to Calvin Coolidge. It states:

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109. *Id.*

110. A.C. GRAYLING, MEDITATIONS FOR THE HUMANIST: ETHICS FOR A SECULAR AGE 37 (2002) (quoting John Lyly).

111. THE OXFORD DICTIONARY AND THESAURUS 1113 (Am. ed. 1996).

112. *Id.*



Nothing in the world can take the place of Persistence. Talent will not; nothing is more common than unsuccessful men with talent. Genius will not; unrewarded genius is almost a proverb. Education will not; the world is full of educated derelicts. Persistence and determination alone are omnipotent. The slogan "Press On" has solved and always will solve the problems of the human race.<sup>113</sup>

M. Scott Peck, M.D., author of the best-selling *The Road Less Traveled*,<sup>114</sup> has also put together a wonderful "anthology of wisdom," entitled *Abounding Grace*.<sup>115</sup> An entire portion of the book is devoted to the virtue of perseverance. According to Peck's analysis, perseverance can be broken down into the following "component virtues": commitment, confidence, constancy, conviction, determination, devotion, diligence, endurance, patience, and perseverance.<sup>116</sup> Indeed, Peck synoptically refers to the virtue of perseverance as "the great virtue of seeing things through."<sup>117</sup> He observes that the predominant theme of perseverance is "that if we persevere in ways that are not stupid or brain damaged, then we can achieve virtually any goal and succeed at any aim we desire."<sup>118</sup> Peck reflects on a critical aspect of perseverance—what he refers to in legalistic terms as "due diligence."<sup>119</sup> He writes: "The most frequent reason I have failed—or witnessed others fail—in an endeavor has been a lack of due diligence. We have simply failed to devote to the endeavor the amount of time, energy, thoughtfulness, or simple caring that the endeavor required."<sup>120</sup>

The virtue of perseverance rounds out the top ten lawyerly virtues. Being able to hang tough and to endure setbacks and disappointments is crucial for a successful career in the law.

### III. SOME SPECIAL VIRTUOUS CHALLENGES FOR PUBLIC LAWYERS

The aforementioned ten lawyerly virtues are essential for all lawyers to understand and to master. Public lawyers, however, face unique challenges in following these virtues in their professional lives. Five particularly special challenges that public lawyers face in pursuing virtue are discussed below.

#### A. *Life in a Fish Bowl*

Public lawyers usually find their professional lives much more open to outside scrutiny than private lawyers. The salary (or retainer arrangement) of a

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113. The Quotations Page, Quotation Details, <http://www.quotationspage.com/quote/2771.html> (last visited May 17, 2006).

114. M. SCOTT PECK, *THE ROAD LESS TRAVELED* (1978).

115. M. SCOTT PECK, *ABOUNDING GRACE: AN ANTHOLOGY OF WISDOM* (2000).

116. *Id.* at 6 (table of contents).

117. *Id.* at 13.

118. *Id.*

119. *Id.* at 136.

120. *Id.*

public lawyer may be public information. Furthermore, the accomplishments, as well as the setbacks, of a public lawyer may appear in agency reports or appropriations memoranda available to the public or to the legislature or even possibly on the front page of the newspaper. In order to endure and even thrive in a fishbowl, public lawyers must strive to perfect the lawyerly virtues of *integrity*, *discipline*, and *perseverance* in order to be above reproach and to achieve the myriad of responsibilities they are charged with accomplishing in the public interest.

### B. Multiple Constituencies

While private lawyers are accountable to their partners in a law firm, to their clients and, ultimately, to state disciplinary authorities, public lawyers may have to answer to the legislature (federal, state, or local) in oversight hearings to determine their performance as measured against enabling legislation that created their jobs and agencies. An example of this might be a lawyer working for the Federal Trade Commission on matters of consumer protection. Public lawyers may have to take directions and orders from the chief executive officer charged with administering the law and policy of their agency. Lawyers working for executive branch agencies (e.g., the U.S. Department of Labor or a state's department of commerce) have to respond to memoranda from the President of the United States, governor of the state, or officials in the chain of command, regarding the settling of litigation or the general enforcement of laws. Public lawyers have to report to superiors within their agency, department, or branch regarding the implementation of law and policy; these superiors will usually (at least at the higher levels) be political appointees of the same political party as the chief executive (or an elected official other than the chief executive such as a state attorney general or county prosecutor). Finally, public lawyers must be sensitive to queries and requests from members of the public at large as well as from reporters of various public media.

The problem of multiple constituencies for public lawyers demands special attention and focus on the lawyerly virtues of *balance*, *energy*, and *justice* in order to do what it takes to properly respond to these constituencies without neglecting any stakeholder; but, without unfairly favoring any one stakeholder.

### C. Low Relative Pay

Public lawyers tend to make less—and, in some instances, much less—money than private lawyers. And yet, the cash value of a stint in the public sector (especially as a cabinet or subcabinet official of state or federal government) creates challenges for public lawyers to properly compartmentalize their professional activities—or they may run afoul of the ethical imperatives of impartiality and evenhandedness. Public lawyers cannot favor, or even provide the appearance of favoring, private firms for which they are interested in working after their stints of public service are over. In a related fashion, private lawyers with aspirations toward public lawyer “plum” positions—for example, appointment as a high ranking lawyer in the U.S. Department of Defense or the U.S. Department of Justice—must scrupulously segregate their private lawyerly

interests from the more circumscribed duties of public lawyers.

The revolving door connection between the private sphere and the public sphere calls for special application by public lawyers of lawyerly virtues of *courage* and *idealism* to strive to avoid self-interest and, instead, to pursue the public interest. In my judgment, a lawyer that exemplified the proper entering and exiting of public roles and private roles was the late Elliot Richardson of Massachusetts.<sup>121</sup>

#### *D. Temptations to Grandstand*

Public lawyers can usually succeed in getting the attention of reporters; as a result, if they wish, public lawyers often can see their names in print. Public lawyers must resist the inclination to supply the media with their own opinions about legal and political adversaries. Although some private lawyers are able to get their names in print about specific cases they are handling, public lawyers have greater temptations to grandstand. The lawyerly virtues of *integrity*, *justice*, and *discipline* are crucial for public lawyers to master in order to deal with the strong temptation to vent egos in the media and, possibly, risk unfair advantage.

#### *E. Herculean Expectations*

Public lawyers are expected to do an endless assortment of tasks and to perform multiple functions. By way of example, several years ago I volunteered to help out a candidate running for the office of Indiana Attorney General. The candidate requested that I research and write a memorandum on the duties and responsibilities of Indiana Attorney General. I was amazed to find *hundreds* of statutory provisions charging that public lawyer—as well as the deputy attorney generals who worked with him or her—with responsibilities to investigate and enforce a panoply of laws. Other public lawyers (federal, state, local, or private attorneys bringing citizen suits as private attorneys general or representing charitable organizations) face similar crushing job performance expectations.

How is one to cope? In order to deal with these Herculean expectations, public lawyers must combine the virtues of *compassion* (to help those in need) and *justice* (to right wrongs) with *creativity* and *discipline* to figure out appropriate priorities and to stretch scarce funds and busy work schedules. There will never be enough time to accomplish all that is expected. There will never be sufficient funds to hire staff needed to do the work. Indeed, legislatures tend to increase the workloads and mandates of public lawyer jobs but then fail to appropriate sufficient money to do the work.

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121. See ELLIOT RICHARDSON, REFLECTIONS OF A RADICAL MODERATE 81-104 (1996). Richardson served in multiple jobs as a public lawyer—including United States Attorney, Attorney General of Massachusetts, Lieutenant Governor of Massachusetts, under U.S. Secretary of State, Secretary of the Department of Health, Education, and Welfare, Secretary of Defense, Attorney General of the United States, and Secretary of Commerce—and as a partner in a major private law firm. He wrote an entire chapter of his book on public service. *Id.*

## CONCLUSION

There are several ways to describe what it means to be an American public lawyer. Elected officials who are lawyers and who perform legal roles in office clearly fit the definition of a public lawyer—whether at the national, state, or local levels. Government lawyers—hired by federal, state, or local government agencies or officers—meet the definition of public lawyer, as well. Surprisingly for some, private lawyers can function as public lawyers when they act as private attorneys general, when they represent charitable organizations, and even when they advance public policy-based legal arguments for private clients.

In pondering how public lawyers should go about trying to do their difficult jobs, we might approach the problem in a negative fashion by seeking to describe the principal vices—like sloth, greed, and anger, for instance—that public lawyers should strive to avoid. Nonetheless, a more positive approach of trying to articulate specific characteristics, or virtues, of a good public lawyer is a more appealing and useful strategy.

All American lawyers—no matter if they work for the government, are lawyers in a private law firm, or in-house counsel in a business—need to focus on the ten vital lawyerly virtues in the following order of relative importance: (1) balance, (2) integrity, (3) idealism, (4) compassion, (5) courage, (6) creativity, (7) energy, (8) justice, (9) discipline, and (10) perseverance. Nonetheless, public lawyers face five specific virtuous challenges in performing their jobs. First, public lawyers must adapt to life in a fish bowl. Second, public lawyers face multiple demanding constituencies. Third, public lawyers must cope with receiving lower relative pay for their work. Fourth, public lawyers must control temptations to grandstand. Finally, public lawyers must handle Herculean expectations from others and themselves. In the final analysis, public lawyers need to exercise the synoptical virtue of *wisdom*<sup>122</sup> in addressing specific challenges with appropriate lawyerly virtues.

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122. According to Professor J. Rufus Fears, achieving the virtue of wisdom is a three-step process of moral education:

*Educo*—to lead out from yourself. An education is a three-stage process, and it begins with information. It begins with every day. In fact, we live in a world in which we are so overwhelmed by facts and data that we have barely time to think. The data becomes so overwhelming that it is difficult to take the next step, which is to weave this into knowledge.

What is knowledge? Knowledge is . . . an ability to see the pattern in a particular subject.

But there is a third step, and that is taking that pattern and living your life by it, applying it. And that is what Socrates, and that is what Cicero, and that is what Dante and that is what Goethe all meant by "wisdom." Wisdom is ultimately an act of mediation.

3 FEARS, *supra* note 1, at 213-14.